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In the Supreme Court of the United States

OCTOBER TERM, 1963-4

No. 850

HEBB & NARODICK CONSTRUCTION CO., INC. and GENERAL CONSTRUCTION CO., joint venturers, doing business as HEBB & NARODICK CONSTRUCTION CO., INC., & ASSOCIATES, *Appellant*,

vs.

THE STATE OF WASHINGTON and WILLIAM S. SCHUMACHER, CLARK SQUIRE and A. E. HANKINS, as the Tax Commission of the State of Washington, *Appellees*.

No.....

HEBB & NARODICK CONSTRUCTION CO., INC., a Washington corporation, *Appellant*,

vs.

THE STATE OF WASHINGTON and WILLIAM S. SCHUMACHER, CLARK SQUIRE and A. E. HANKINS, as the Tax Commission of the State of Washington, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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JURISDICTIONAL STATEMENT

A single Jurisdictional Statement is being filed covering both cases appearing on the title page, pursuant to Rule 15(3), for the reason that the two cases are appealed from the same court, and involve identical

questions. The first listed case involves the construction of military housing at Fort Lewis, Washington. The second listed case involves the construction of military housing at Fairchild Air Force Base at Spokane, Washington. All facts referred to herein will be taken from the record in the first listed case, as will all page references to the record.

A. OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported in — Wn.(2d) —, 384 P.(2d) 337. A copy of the opinion is attached hereto as Appendix A.

B STATEMENT OF GROUNDS

(1) Appellant instituted action to recover retail sales taxes paid under protest, and to enjoin the State of Washington from collecting further retail sales taxes assessed against appellants in connection with the construction of military housing on a military reservation under a contract with the United States, entered into pursuant to the provisions of the Act of Congress popularly known as the Capehart Act. The action was brought under Revised Code of Washington 82.32-180 and 82.32.150.

(2) The judgment of the Supreme Court of the State of Washington was entered on August 1, 1963. The order denying appellants' petition for rehearing was entered September 26, 1963. Notice of appeal was filed in the Supreme Court of the State of Washington on December 20, 1963.

(3) The jurisdiction of the Supreme Court of the

United States to review this judgment by appeal is conferred by Title 28, U.S.C. Sec. 1257(2).

(4) The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on appeal:

Kern Limerick, Inc. v. Scurlock, 340 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403;

U.S. v. Boyd, Supreme Court Docket No. 1157;

General Motors Corp. v. Washington, Supreme Court Docket No. 1071;

Livingston v. U.S., 179 F.Supp. 9, 364 U.S. 281, 4 L.Ed.(2d) 1719, 80 S.Ct. 1611;

James v. United Artists Corp., 305 U.S. 410, 83 L.Ed. 256, 59 S.Ct. 272;

Gwinn, White & Prince v. Henneford, 205 U.S. 434, 83 L.Ed. 272, 59 S.Ct. 325.

(5) The State statutes involved are Revised Code of Washington Sections 82.04.040, 82.04.050, 82.04.060, 82.04.190, 82.08.010, 82.08.020, 82.08.030, 82.08.050.

The above are set forth in Appendix B.

C. QUESTION PRESENTED BY THIS APPEAL

The following question is presented by this appeal:

Public quarters owned and operated by the United States are constructed for the United States on a military reservation, pursuant to the provisions of the Capehart Act (42 U.S.C.A. Sec. 1594a *et seq.*). Is the Washington State retail sales tax statute, as construed and applied by the Supreme Court of the State, repugnant to the Constitution and laws of the United States, in that it imposes a state sales tax on the United

States or its instrumentality based upon the cost of such construction to the United States, in violation of the immunity of the United States and its instrumentalities from state taxation?

In the State of Washington, the retail sales tax is imposed by statute on the buyer or consumer, and not on the seller. The statute requires the seller merely to collect the sales tax on behalf of the State, and pay it over to the State (Revised Code of Washington 82.08-.050). It was stipulated in the pre-trial order that when the appellant contractor submitted its bid to the United States, it did not include sales tax as an item of cost, or collect sales tax. The State's assessment against the appellant contractor is based squarely upon the claim that the contractor should have collected sales tax as agent of the State, but failed to do so.

As will be demonstrated, the buyer or consumer of the military housing owned and operated by the Army can only be the United States or its instrumentality. The Washington State Supreme Court held that sales tax should have been collected by appellant.

Thus, the Washington State retail sales tax statute, as construed and applied by the Supreme Court of the State of Washington, is repugnant to the Constitution and laws of the United States, in that is does impose the state sales tax on the United States or its instrumentality, in violation of its constitutional immunity from State taxation.

D. (1) STATEMENT OF THE CASE

A "Capehart" military housing project for the U.S. Army is initiated and completed as follows:

The Secretary of the Army determines that the Army requires military housing facilities on a military reservation. Plans and specifications are prepared by the Army Engineers. The United States calls for bids. The contractor submits its bid to the United States accompanied by the required $25,000.00 bid deposit. The bid of the successful contractor is accepted by the United States, in the form of a document entitled "Letter of Acceptability," given to the contractor by the Secretary of the Army (Ex. 3, R. 13-14).

Construction takes place under the supervision of the Army (Ex. 8, Pages HC-7, 8, 14). As each separate military housing unit is completed, the contractor is required to place it "under the control of the Department (of the Army)," and the United States is required at all times to "maintain and operate at its own cost and expense such individual housing unit as public quarters" (Ex. 8, p. HC-7).

The contract with the contractor contains all clauses which Federal law requires in every contract with the United States for the construction of Federal Public Works, such as: Buy American Act, Officials of Congress Not to Benefit, Covenant Against Contingent Fees, Prohibition of Convict Labor Act, Nondiscrimination in Employment Act, Davis-Bacon Act (requiring payment of prevailing wages as determined by the Secretary of Labor), Eight-Hour Day on Public

Works Act, Anti-Kickbacks from Public Works Employees Act, Renegotiation Act, and others (Ex. 8).

In the "Invitations for Bids" (Ex. 1, p. 16), the United States describes the project as follows:

> "The Housing Contract provides *for the construction of Government quarters*, and therefore, no inspection fees or approvals by municipal or other governmental authorities will be required."

THE ONLY DIFFERENCE BETWEEN A CAPEHART MILITARY PROJECT AND ANY OTHER PROJECT BEING BUILT FOR THE FEDERAL GOVERNMENT, IS IN THE METHOD BY WHICH THE UNITED STATES CHOOSES TO PAY FOR THE CONSTRUCTION (Ex. 1).

The method by which the United States pays for the construction is this:

The United States requires that a Delaware corporation be formed. It requires that this corporation execute and deliver a promissory note to a lending agency for the amount of the contract price of the construction. The promissory note is payable in installments (Ex. 9). *It is provided that the United States, and not the corporation, will pay the installments as they become due* (Ex. 16). With the proceeds of this note, the contractor is paid the contract price for the construction of the military housing for the United States (Ex. 1, 3, 4, 9).

This is the method of financing used by the United States for the construction of military housing under the Capehart Act generally, and is the method of financing used by the United States for the construction

of the military housing on Fort Lewis in the instant case.

Since the funds are by this method acquired through private lending institutions, the United States avoids charging the cost of construction against the national budget in the year of commitment. It also obtains for the United States the privilege of paying the installment note from annual appropriations.

The United States also requires the execution of a mortgage in connection with borrowing the money to pay for construction. The reason is this: Many institutions which lend or invest their funds can only do so on the security of mortgages. These include pension or retirement trusts, insurance companies, and the like. The restrictions limiting their investments to mortgages are contained in their charters, or their state law.

Some institutions are permitted to loan only on F.H.A. insured mortgages.

Therefore, in order to enable such institutions to invest their funds in the construction of military housing, the method which the United States has created for the payment by it of the promissory note, also includes a "mortgage." Because of the nature of the security, the mortgage is one in name only—an illusory mortgage.

In order to create the illusion of a "mortgage," the following sequence of events is required by the United States.

In an opinion dated October 22, 1959, rendered by

the Attorney General of the United States to the Secretary of Defense, it is stated:

> "The actual operation of the Capehart Act is extremely complex. Indeed, it has been characterized as a jig-saw puzzle on the floor of the Senate."

The sequence of events is required by the United States in the contract created by the contractor's *offer* (his "Bid," Ex. 2), and the *acceptance* of the United States (its "Letter of Acceptability" Ex. 3).

The exact text of each document hereinbefore and hereinafter referred to, is prescribed and required by the United States (R. 18).

The requirements of the United States are these:

(1) That the contractor cause to be incorporated a Delaware corporation (Ex. 1, p. 4).

(2) That the corporation be capitalized for $1,000.00 —100 shares at $10.00 each (Ex. 1, p. 4).

(3) That the contractor subscribe for all of the stock (Ex. 1, p. 4).

(4) That the contractor elect officers and directors (Ex. 1).

(5) That the stock certificate be endorsed in blank by the contractor (Ex. 1).

(6) That the officers and directors of the corporation sign resignations (Ex. 11).

(7) That the endorsed stock certificate and the resignations be placed in irrevocable escrow (Ex. 11).

(8) That the terms of the escrow be that these documents shall be delivered to the Secretary of the Army

of the United States, immediately upon completion of construction (Ex. 11).

(9) That at the same time the resignations and stock are placed in escrow for the United States, the Secretary of the Army execute a document entitled "Lease" to the Delaware corporation (Ex. 6).

(10) That this "lease" be of the land owned by the United States, on which the military housing is to be erected (Ex. 6).

(11) That the corporation turn over to the Army, as the stated consideration for the "lease," the $1,000.00 paid to the corporation for the purchase of its capital stock (Ex. 1).

(12) That a document entitled "Department of the Army Housing Contract" be signed by the following: The United States, the contractor, and the Delaware corporation (Ex. 8).

(13) *That these documents provide that the lessor, rather than the lessee, has the exclusive right of possession of the leased ground during the entire term of the lease!* (Ex. 8, p. HC-7).

(14) That the Delaware corporation execute and deliver a promissory note, payable in installments, to some lending institution (Ex. 9).

(15) That the installment note be in a sum equal to the amount of the contractor's successful Bid, previously accepted by the United States (Ex. 1).

(16) *That the United States execute a document in which it is agreed that the United States, rather than*

the Delaware corporation, will pay the promissory note (Ex. 16).

(17) That the Delaware corporation execute and deliver a document entitled "Mortgage," to "secure" the promissory note which the United States has agreed to pay (Ex. 10).

(18) That the mortgaged property be not the land, or the buildings to be erected, but only the Delaware corporation's non-existent leasehold interest (Ex. 10).

(19) That the F.H.A. agree in advance to insure the note and "mortgage" immediately upon completion of construction (Ex. 5).

(20) That the contractor construct the military housing in accordance with its accepted Bid to the United States (Ex. 1).

(21) That the lending agency use the proceeds of the loan represented by the promissory note to pay the contractor for the construction of the military housing (Ex. 3).

(22) That progress payments and final payment to the contractor be made only with the approval of the United States (Ex. 8, p. HC-3).

(23) That the documents provide that during the entire term of the illusory "lease," the lessee Delaware corporation is *prohibited from occupancy* of the leased premises, and that during the term of the "lease" the lessor United States "*shall maintain and operate at its own cost and expense such individual housing units as Public Quarters*" (Ex. 8, p. HC-7).

* * *

The following nomenclature is used in the documents:

The contractor is called "Eligible Builder."

The figurehead Delaware corporation is called "Mortgagor-Builder."

The document in which the United States agrees that it will pay the installment note executed by the figurehead corporation is entitled "Guaranty" (Ex. 16).

The so-called "Guaranty" is not a guaranty, but is a direct statement that the United States, rather than the figurehead corporation, will pay the loan. This document states:

> "This guaranty, executed this 12 day of May, 1958, by the UNITED STATES OF AMERICA (hereinafter called the 'Department') represented by the Secretary of the Army (hereinafter called the 'Secretary'),
> WITNESSETH:
>
> " * * * The Department will, subject to the conditions stated in the foregoing guarantee, *make each periodic payment becoming due to the mortgagee on said note in accordance with the terms thereof* WITHOUT ANY REQUIREMENT THAT THE MORTGAGEE SHALL HAVE MADE A PRIOR DEMAND TO THE MORTGAGOR-BUILDER (the figurehead corporation) FOR SUCH PAYMENT."

NOTE: The Attorney General of the United States on October 22, 1959, rendered an opinion to the Secretary of Defense, in part as follows:

> "See also * * * 105 Congressional Record A 4156 pointing out * * * that a guaranteed mortgage

constitutes a 'truly direct obligation' of the United States." * * *

"I conclude that Congress has the power to authorize the Secretary to guarantee Armed Services Housing mortgages * * * My conclusion that the Secretary's loan guaranty under Sec. 403 (c) of the act constitute a valid obligation of the United States is fully supported by pertinent congressional statements."

On page 2 of Exhibit 1, "Invitation for Bids," the United States describes this so-called "Guaranty" in the following words:

"Payment of the mortgage indebtedness of the mortgagor-builder is undertaken by the Department (of the Army)."

* * *

As stated, the illusory "mortgage" and the promissory note signed by the figurehead corporation, but payable directly by the United States, is also insured by the F.H.A. The reason for this is not that the direct obligation of the United States to pay the note is not a sufficiently sound security. The actual reason is stated by the Attorney General of the United States in the above described Opinion rendered to the Secretary of Defense, as follows:

"Two preliminary questions present themselves. First, why Congress provided for double protection: i.e., insurance by the (F.H.A.) Commissioner, and guaranty by the Secretary (of Defense) ... The duplication of insurance by the Commissioner and guaranty by the Secretary is based on the consideration that, while, basically, Armed Services Housing constitutes a responsibility of the Department of Defense, mortgages insured by the Federal

Housing Administration can be financed relatively easily because virtually all states have legislation making them legal investments for banks and similar institutions. The enactment of state legislation making mortgages insured or guaranteed by the Secretary legal investments throughout the nation, and thus generally acceptable to institutional investors, probably would have taken five years, to judge from past experience. In these circumstances it appeared desirable that Armed Services Housing mortgages should carry the customary insurance by the Federal Housing Commissioner as well as a guaranty by the Secretary of Defense."

* * *

The entire military housing project is not paid for through this round-about Capehart method. The documents provide that certain "improvements and utilities" shown on the plans and specifications are to be furnished by the United States, and not by the contractor. The United States enters into separate contracts with others to furnish these improvements and utilities, and pays for them directly.

> "Payments under such separate contracts will be made by the Department (of the Army) from sources other than mortgage proceeds."

Part of the project is thus paid for directly by the United States, in the usual way, and part of the project is paid from the proceeds of the note and "mortgage" signed by the figurehead corporation.

* * *

Even though all the buildings are to be built by one contractor, pursuant to one Bid made to and accepted

by the United States, there may be more than one Delaware corporation involved in the financing. This is because the amount involved may be too great for any one private institution to loan. In such cases, the United States allocates definite portions of the single contract price among two or more Delaware corporations. Except for the "Housing Contract" (Ex. 8), a full set of documents as above described are made and executed relating to each corporation.

Thus, in the instant case, the plaintiff contractor's bid accepted by the United States was approximately $6,000,000.00. The United States directed that three Delaware corporations be created, and that each one execute a promissory note for approximately $2,000,000.00. The United States then executed three separate documents in which it agreed that it, rather than these corporations, would pay the three notes. The sum of the three notes equalled the amount of the plaintiff's Bid which the United States had accepted (Ex. 1, p.3).

The "Housing Contract" (Ex. 8) shows clearly that the United States required the creation of the "mortgagor-builder" corporation, that the corporation is an instrumentality of the United States, a figurehead of the United States — in fact, to all intents and purposes it is the United States. The "Housing Contract" shows that the United States and the Contractor are the only parties in interest in either the "lease" or that contract. The contract is exactly the same as if the United States and the contractor were the only two parties named to the agreement.

The named parties to the "housing Contract" are:

(1) "THE UNITED STATES OF AMERICA, acting by and through the Department of the Army (hereinafter called "The Department") and represented by the Contracting Officer,"

(2) "HEBB & NARODICK CONSTRUCTION CO., INC. & ASSOCIATES (hereinafter called the 'eligible builder' or the 'Contractor'),"

(3) "ALC HOUSING INC. No. 1, ALC HOUSING INC. No. 2, and ALC HOUSING INC. No. 3, Delaware corporation (each and all of which are hereinafter referred to as the 'mortgagor-builder'),"

Following is a brief summary of some of the provisions of the "Housing Contract" and "Lease" not previously mentioned:

(1) The Housing Contract is entitled

> "DEPARTMENT OF THE ARMY HOUSING CONTRACT." (Ex. 8, p. 1)

(2) The first "Whereas" clause shows that it is the Army, not the figurehead corporation, which is contracting for housing:

> "Whereas, Title IV of the Housing Amendments of 1955, as amended * * * authorizes THE DEPARTMENT TO CONTRACT, ON THE BASIS OF COMPETITIVE BIDS, FOR THE CONSTRUCTION OF HOUSING * * * " (Ex. 8, p. 1)

(3) The "Lessee" is prohibited from ever occupying the leased property — either before or after construction (Ex. 8, p. HC-7; Ex. 6, p. 2).

(4) The "Lessee" is required to consent to giving the Army Lessor exclusive possession of the leased premises for the full term of the so-called lease, "with-

out charge or cost to the Department." The "Lessee" gets no compensation in return for giving the Army lessor the exclusive right of possession (Ex. 8, p. HC-7).

(5) The "Lessee" cannot engage in any other endeavor, on the leased premises, or elsewhere, because (a) its Articles of Incorporation prohibit it from engaging in any other endeavor, and (b) the "Lease" provides that the premises are "to be used solely for the purposes of constructing thereon an Armed Services Housing Project" (Ex. 6, p. 1).

(6) The "Lessee" has no voice in what is done with the leased premises, because the U.S. had already accepted the contractor's bid to construct a project on the entire leased premises in accordance with plans and specifications drawn by the U.S. (Ex. 2, Bid, and Ex. 3, Letter of Acceptability).

(7) The "Lessee" is prohibited from asking the bank to pay out any money to the contractor from the $6,000,000.00 note which it signed. The U.S. has the sole voice in that respect (Ex. 8, p. HC-3).

(8) The figurehead corporation is prohibited from entering into any agreement with the contractor (Ex. 8, p. HC-5).

(9) The "Lessee" is "required" to sign whatever form of Building Loan Agreement is acceptable to the U.S. (Ex. 8, p. HC-8).

(10) Even personal property which the contractor is required to furnish — which never becomes part of the real estate — belongs to the U.S., rather than the "Lessee," and the "Lessee" is prohibited from using the same during the term of the lease (Ex. 8, p. HC-9).

(11) The U.S. has the right to extend the time for completion of the project as long as it desires (Ex. 8, p. HC-16).

(12) Any articles of property belonging to the contractor which he fails to remove from the leased premises when the job is completed, are deemed abandoned to the U.S. Lessor, rather than to the "Lessee" (Ex. 8, p. HC-20).

(13) It is specifically provided that whenever words "satisfaction," "required," "ordered," "acceptable," "approved," etc., are used, those words refer to the "satisfaction," "approval," etc., of the U.S., not of the figurehead (Ex. 8, p. HC-31).

(14) The "Determination of Completion" is made solely by the United States (Ex. 8, p. HC-7).

(15) The United States, not the figurehead, has the right to terminate the contract and assess liquidated or actual damages against the contractor (Ex. 8, p. HC-37).

(16) The figurehead corporation is specifically relieved of every single obligation nominally placed upon it by the Housing Contract, by a specific provision in the Housing Contract itself that all obligations of the figurehead shall be performed either by the United States or by the contractor (Ex. 8, p. 8, HC-9).

> *"The eligible builder shall bear all expenses * * * and guarantee the discharge of all duties of the mortgagor-builders * * * except * * * the obligations of the mortgagor-builders which the Department shall have guaranteed * * *."*

THUS, IN THE "HOUSING CONTRACT"

ITSELF, THE CONTRACTOR AND THE UNITED STATES AGREE THAT THERE IS NOT A SINGLE OBLIGATION PURPORTEDLY PLACED UPON THE FIGUREHEAD CORPORATION, WHICH IS NOT EITHER THE OBLIGATION OF THE CONTRACTOR, OR THE OBLIGATION OF THE UNITED STATES — PROVING BEYOND DISPUTE THAT THERE ARE ONLY TWO REAL PARTIES TO THIS "CONTRACT": THE CONTRACTOR, AND THE UNITED STATES.

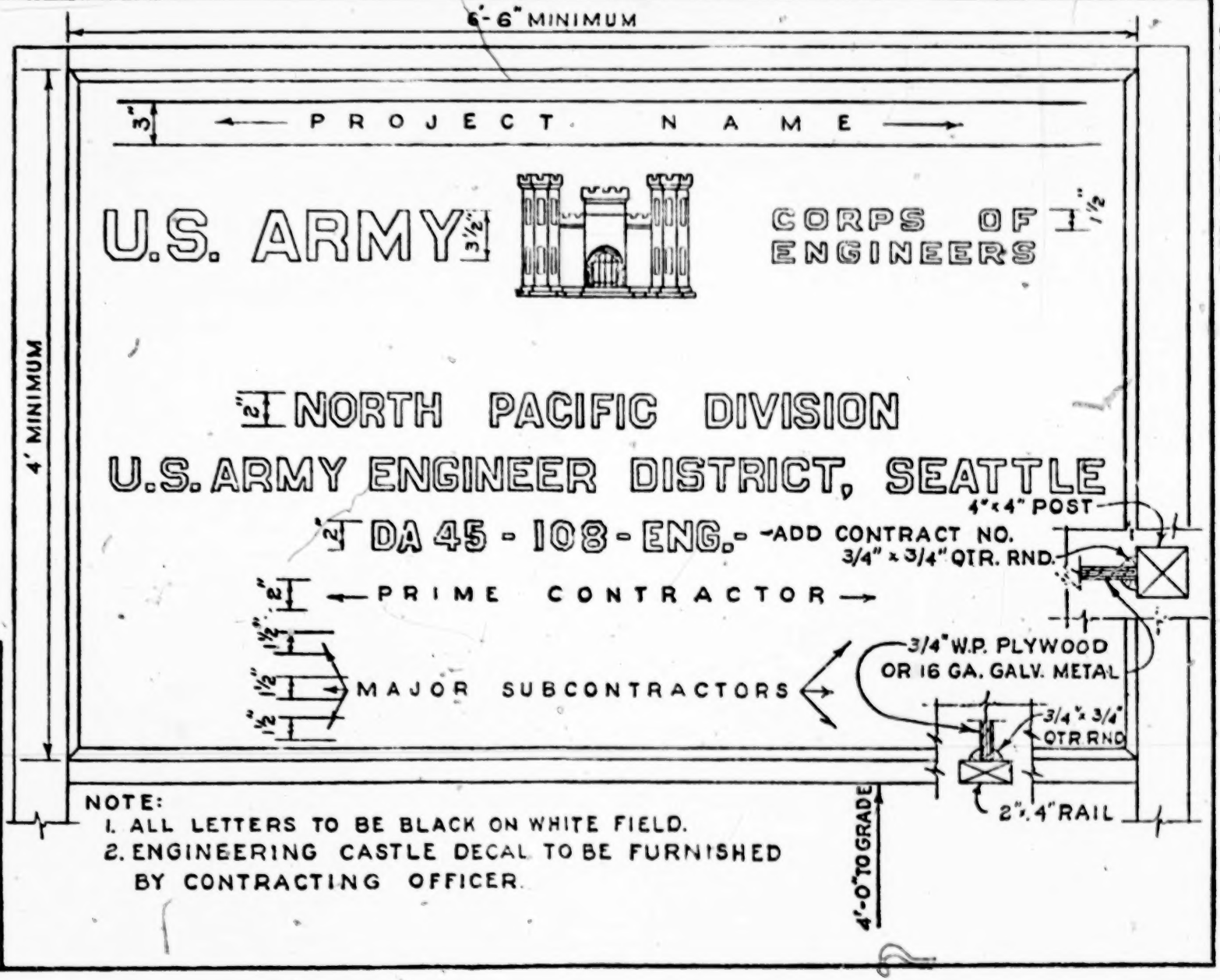
(17) The contract provides that the project is not subject to local real or personal property taxes. The United States agrees to hold the mortgagee harmless from payment of such taxes, and contends that such taxes are not applicable (Ex. 8, p. HC-8).

(18) Par. 3 of the "Lease" requires "that the lessee shall place each housing unit in the Project under the control of the Department as soon as it is available for occupancy as determined by the Commissioner."

NOTE: This is meaningless language, because:

a. The Capehart Act, 42 USCA 1594, requires that this identical clause be inserted in the contract between the United States and the Contractor:

> "The Secretary of Defense is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned * * * by the U.S. for the purpose of providing suitable living accommodations for military personnel * * * Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of



CORPS OF ENGINEERS

STANDARD DETAIL

PROJECT SIGN
U. S. ARMY

U.S. Army Eng. Dist., Seattle, Wn.
Dr. Not To Scale
Tr. J.F.B. 18 Sept. 1957
CK.

File No. 49-/40-0503

Defense as soon as the unit is available for occupancy * * * ."

b. The "Housing Contract" provides that the Contractor shall place each unit as completed "under the control of the Department" (Ex. 8, p. 7).

c. The figurehead never has any right of possession to turn over to the United States.

d. Art. XXI of the Housing Contract provides that every obligation purportedly placed upon the figurehead shall be performed instead by the contractor.

(19) Par. 5 of the lease provides:

"That the buildings and other improvements required to be furnished the project in accordance with the Drawings and Specifications SHALL BE AND BECOME REAL ESTATE AND PART OF THE LEASED PREMISES AND PROPERTY OF THE UNITED STATES."

NOTE: As each unit is completed, the contractor is required to place it under the sole control of the Army (Ex. 8, p. 7). The Lessee is prohibited from occupancy at any time during the lease (Ex. 8, p. 7). This clause goes further and says that the buildings as built become the property of the United States.

(20) The Federal Tort Claims Act applies to the project (Ex. 6, p. 9).

(21) The contractor is required to erect on the "leased" premises a large sign which tells the world that the project is that of the Army, and that the appellant is the contractor for the United States. A drawing of the required sign is contained in the Housing Contract (Ex. 8, p. HC-39) facing this page.

D. (2) FEDERAL QUESTION RAISED BELOW

By their Complaint (R. 3-4), their contentions in the Pre-trial order (R. 14), and the Findings of Fact and Conclusions of Law proposed by them (R. 64-67), appellants raised in the Superior Court the federal questions sought to be reviewed here, namely that levying a State sales tax on the construction of the military housing is prohibited by the supremacy clause of the Constitution of the United States.

On appeal to the Washington Supreme Court, appellants likewise raised the federal questions sought to be reviewed here in the assignment of error in their Opening Brief (R. 74) and in the arguments presented therein, and in their Reply Brief (R. 78).

The Supreme Court of Washington passed upon these Federal questions by holding that the Capehart corporation which the U.S. required be created was not its instrumentality, that the U.S. was not the buyer of the military housing, that assessing State sales tax against the Capehart corporation was not a tax by a State upon the U.S. or its instrumentality, and that the Washington State sales tax statutes required that the sales tax be assessed against the Capehart corporation (Appendix A). Quotations from the opinion are set forth in the following section.

E. THE FEDERAL QUESTION IS SUBSTANTIAL

The Federal question is substantial for the following reasons:

1. The State court held in effect that the United States or its instrumentality is subject to State sales

tax. Four members of the Washington State Supreme Court dissented on this basis, in the 5 to 4 decision below.

2. The State court decision is contrary to and substantially destroys the intent of Congress in substituting Capehart Act military housing (built by and for and financed by the U.S.) for the Wherry Act housing (under which land on a military reservation was truly leased to a private corporation which privately and at its own expense constructed the housing for its own use as rental property).

3. There is now a diversity of opinion by highest State courts on the identical question—the instant decision by the Washington State Supreme Court being directly contrary to the decision of the Supreme Court of Florida, *Green v. Eglin Air Force Base Housing, Inc.*, 104 So.(2d) 463, and directly contrary to the decision of the Supreme Court of Michigan, *Knapp-Stiles, Inc. v. Michigan Dept. of Revenue*, 370 Mich. 629, 122 N.W.(2d) 642. Florida and Michigan both hold that State sales tax cannot apply to Capehart housing contracts in that it would be a tax by a State upon the United States or its instrumentality (the figurehead corporation it required solely for its own financial ends).

In the *Green* case, the Florida Supreme Court held:

> "That Centex is a contractor employed by the United States is quite obvious. The United States advertised for bids for the work to be done. It accepted Centex's bid. It signed the contract with Centex and it is in process of supervising the construction. It arranged the method by which Centex will be paid and it is obligated to eventually pay

the cost of construction by paying off the mortgages. It would seem to be equally obvious that the materials purchased go into and become a part of the public works owned by the United States. * * *

"It is very doubtful if these corporations should be regarded as anything other than agencies or instrumentalities of the Federal Government. In *Clallam County, Wash. v. United States*, 263 U.S. 341, the Supreme Court held that a corporation created for the purpose of operating a sawmill and railroad in the promotion of the war effort during the first World War and which was wholly owned by the United States was an agency of the United States and that its property was, therefore, immune from State taxation. In describing the corporation there involved they used language peculiarly applicable to each AFB corporation:

"'The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends.'

"*The creation of the AFB corporations was only for the convenience of the United States to enable it to finance military construction in a manner determined by the Congress to be most conducive to the national interest.*" (Emphasis ours)

Similarly, in the *Knapp-Stiles* case, the Supreme Court of Michigan held with reference to identical Capehart housing:

"We agree with the holding of the trial court that plaintiff's housing construction contract is with the United States acting through its instrumentality, the Department (of the Army)."

To like effect, the four dissenting judges of the Su-

preme Court of the State of Washington in the instant case held:

> "Contemporaneous with the signing of the housing contract, the stock of the corporation in the instant case was irrevocably placed in escrow, together with the resignations of the officers and directors, to be delivered to the United States at the conclusion of the construction of the housing. There was no possible contingency for the return of the stock to the stockholders or the documents of resignation to the officers and directors. The corporation owned nothing of any value in the housing being constructed. It served solely as a means to the end of obtaining military housing for the United States. There was no possibility for it to engage in any purpose other than to serve the end of obtaining military housing for the United States on this exclusive project. Because it had no purposes independent of those of the United States, the corporation was nothing more than an instrumentality thereof. * * * it was nothing more than an instrumentality of the United States Government; that it had no commercial purpose other than the convenience of the United States, serving as a means to the end of obtaining this military housing; and that the sovereign immunity of the Federal Government applies."

The majority opinion in the instant case, on the other hand, without pointing to one single fact to support its statement, holds:

> "The mortgagor-builder corporate entity created for the purpose of constructing and financing Capehart housing serves a separate and distinct function from that of the United States."

This diversity of opinion in State Court rulings should be resolved by this Court.

4. Of great substantial importance, is the fact that in the Capehart Act, Congress has conceived a new and useful method of financing Federal projects. It does so by the use of private banking or institutional capital which the United States directs be borrowed with the aid of its instrumentality, the creation of which is commanded by the United States. The loan executed by this instrumentality of the United States is to be repaid to the lender directly by the United States, and not by its instrumentality.

Congress may well determine to use this method of Federal financing, and other methods akin thereto, for future military projects and for future Federal non-military projects.

The instant 5 to 4 decision of the Supreme Court of the State of Washington, if allowed to stand — that when the United States determines to finance its public projects in this manner, the entity which the United States requires be created solely for its own financial ends is not an instrumentality of the United States and is subject to State taxation — can well substantially impair or destroy the desirable flexibility of method available to Congress in financing necessary Federal projects.

5. In addition, we adopt in full the reasons set forth in the corresponding portions of their Jurisdictional Statement by the two other companion cases with which we were consolidated for trial and which are simultaneously on appeal to this Court. In the interests of

brevity we are adopting their reasons by reference, instead of repeating the same herein.

CONCLUSION

The question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDICES
A AND B

Appendix A—Opinion of the Supreme Court of the State of Washington App. A, pages 3 to 24

Appendix B—Statutes Involved App. B, pages 1 to 13

APPENDIX A

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

[Nos. 36226, 36227, 36228, 36229. En Banc. August 1, 1963]

IAN MURRAY *et al.*, *Appellants*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.

INLAND EMPIRE BUILDERS, INC., *et al.*, *Appellants*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.

HEBB & NARODICK CONSTRUCTION CO., INC., *et al.*, *Appellants*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.

HEBB & NARODICK CONSTRUCTION CO., INC., *Appellant*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.*

Consolidated appeals from judgments of the Superior Court for Thurston County, Nos. 32176, 32186, 32195, 32196, Charles T. Wright, J., entered July 3, 1961. *Affirmed.*

Consolidated actions to recover taxes paid under protest. Plaintiffs appeal from judgments in favor of the defendant.

Bogle, Bogle & Gates, Edward G. Dobrin, and *Richard S. Sprague*, for appellants Murray *et al.*

Allen, DeGarmo & Leedy and *Seth W. Morrison*, for appellants Inland Empire Builders, Inc., *et al.*

Casey & Pruzan, by *Carl Pruzan*, for appellants Hebb & Narodick Construction Co., Inc., *et al.*

The Attorney General, John W. Riley, Chief Assistant, and *Timothy R. Malone, Assistant*, for respondents.

OTT, C, J.—This appeal is a consolidation of four actions brought by several contractors to recover a retail sales tax paid under protest, and to enjoin the State Tax Commission from assessing the sales tax in connection with the construction of Capehart Act housing at military installations in Washington.

From adverse judgments, the contractors appeal.

The facts upon which these appeals are predicated are not in dispute. The legal issue involved is whether the transactions, pursuant to which the military housing was constructed, are shielded from state taxation by the sovereign immunity granted to the United States government by the federal and state constitutions.

Each of the appellants was awarded contracts under the provisions of the Capehart Act (69 Stat. 651-654 as amended). Since the contract provisions are identical, we will refer only to the material portions of the documents in cause No. 36226. The procedure for the execution of a contract under the act, in so far as here material, may be stated as follows:

The Secretary of Defense, after determining a need for military housing, issues an invitation for bids. The contractor submitting the lowest acceptable bid receives a "Letter of Acceptability" from the Secretary. The letter requires the successful bidder to establish a private "mortgagor-builder" corporation under the laws of the state of Delaware, and to qualify it to do business in the state involved. The contractor furnishes the corporation with $1,000 for capital stock, purchases all of it, and elects its officers and directors. The United States government executes to the corporation a 55-

year lease of the real estate upon which the housing is to be constructed. The corporation is to obtain private financing by giving a mortgage on its leasehold, and obtain a commitment from the Federal Housing Administration to insure its mortgage loan. The mortgage loan in is the amount of the contractor's bid.

The "Letter of Acceptability" prescribes the "initial closing" procedure, which entails the execution of the following documents:

(1) The 55-year lease between the United States and the corporation for a consideration of $1,000, paid by the corporation to the United States government. The corporation agrees, during the period of construction, to maintain insurance and to save the United States government harmless from many laws, ordinances, and regulations applicable to the leased premises, with regard to construction, sanitation, licenses or permits to do business.

(2) The corporation executes a note, secured by a real and chattel mortgage on its real-estate leasehold, to the private lender.

(3) The corporation, contractor, and the United States execute a housing contract which provides that all construction is to be inspected and supervised by the United States; that progress payments are to be made by the corporation from the mortgage loan, upon request of the contractor and approval of the United States, and that, upon full payment, title to the housing units vests in the United States, subject to contractor liability for latent defects. The contract further provides that the contractor shall act as agent for the cor-

poration, guarantee its performance, and furnish a performance bond to the corporation and the mortgagee.

(4) An irrevocable escrow agreement is executed which provides that the resignations of the officers and directors of the corporation, and the stock certificates of the corporation, endorsed in blank, are to be placed in escrow, with instructions to the escrow holder to deliver these documents to the United States upon completion and acceptance of the project.

(5) The United States executes a written guarantee to pay the mortgage installment payments to the private mortgagee and/or the Federal Housing Administration, the insurer.

The provisions of the Capehart Act were fully complied with by the contractors involved in these appeals.

Appellants' assignments of error raise two principal issues: First, the appellant contractors contend that, under Washington law, the consumer of the housing project is the party liable for payment of the sales tax, and that, as a result of the statutory method for the construction of Capehart housing, the United States is the consumer and, therefore, its constitutional immunity from state taxation applies. Secondly, appellants contend that the mortgagor-builder corporation is an agency of the United States and, as such, is immune from state tax.

[1] The function of interpreting state statutes to determine who is liable for payment of a sales tax is reserved to the state courts involved. *Alabama v. King & Boozer*, 314 U.S. 1, 86 L.Ed. 3, 62 S.Ct. 43, 140 A.L.R.

615 (1941); *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954).

RCW 82.08.020 provides that " . . . there shall be collected a tax on each retail sale in this state . . . " A retail sale is defined in RCW 82.04.050 as including

" . . . the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: . . . (b) the constructing . . . of new or existing buildings or other structures under, upon, or above real property *of or for consumers*, . . . " (Italics ours.)

A consumer is defined in RCW 82.04.190(4) as "Any person who is an *owner, lessee or has the right of possession* to or an easement in real or personal property . . . " (Italics ours.)

RCW 82.08.050 provides in part:

"The tax hereby imposed shall be paid by the *buyer* to the seller, and each *seller* shall collect from the *buyer* the full amount of the tax payable in respect to each taxable sale . . .

"In case any seller fails to collect the tax herein imposed . . . he shall . . . be personally liable to the state for the amount of the tax." (Italics ours.)

Appellants concede that a retail sale, as defined in RCW 82.04.050, did occur, but contend that the consumer defined in RCW 82.04.190, and the buyer denominated in RCW 82.08.050 are synonymous, and that the United States government is the consumer and taxable party because it becomes the owner of the housing units upon their completion and acceptance.

[2] With this contention, we do not agree. One of the purposes of RCW 82.04.050 is to define the event that gives rise to a taxable transaction, which is the rendition of labor and services in the construction of new buildings upon real property of or for consumers. RCW 82.04.190 establishes the means by which the consumer is identified. These sections do not designate the party liable for payment of the tax in any given transaction. RCW 82.08.050 provides that the retail sales tax shall be borne by the buyer, who is primarily liable for payment of the tax. *Kaeser v. Everett*, 47 Wn.(2d) 666, 289 P.(2d) 343 (1955).

We must therefore determine who is the buyer under the facts of the instant case. In this regard, appellants contend that the United States is the buyer because it bears the economic burden of paying for the military housing, by virtue of its guarantee of the mortgage obligation.

In *Alabama v. King & Boozer, supra*, the state of Alabama, pursuant to a statute which imposed the sales tax upon the purchaser, levied a sales tax upon the sale of lumber to a contractor who was constructing installations for the Army. It was there contended that the sales tax could not be collected from the contractor for the reason that the United States was the purchaser, within the meaning of the Alabama statute. In answering this contention, the Supreme Court of the United States held:

" . . . The taxing statute, as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller, who is required 'to add to the sales price' the

amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. *But it seems plain, as the Government concedes and as we assume for present purposes, that under the provisions of the statute the purchaser of tangible goods who is subjected to the tax measured by the sales price, is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit....*" (Italics ours.)

The court concluded:

"We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James v. Dravo Contracting Co., supra* [302 U.S. 134]."

[3, 4] Applying this rule, the buyer is the person who is *legally obligated* to pay the seller in any transaction. The housing contract executed by the parties provided that "The mortgagor-builder [corporation] shall pay the eligible-builder [contractor] for the performance of this Housing Contract, and all other obligations of

the eligible builder herein, . . . " By the express terms of the contract, the corporation, and not the United States, was obligated to pay the appellant contractors; hence, the corporation was the buyer under the statute. Under the provisions of the Capehart Act and the facts in the instant case, the United States government was not obligated to pay the seller. The fact that the ultimate economic burden of the tax may fall upon the United States does not vitiate a state tax on the transactions. *Alabama v. King & Boozer, supra; Kern-Limerick, Inc., v. Scurlock, supra; United States v. Detroit,* 355 U.S. 466, 2 L.Ed.(2d) 424, 78 S.Ct. 474 (1958); *E. I. Du Pont de Nemours & Co. v. State,* 44 Wn.(2d) 339, 267 P.(2d) 667 (1954).

Our conclusion in this regard is also supported by the following cases:

United States v. Harrison & Grimshaw Constr. Co., 305 F.(2d) 363 (1962), involved the question of whether the provisions of the Miller Act applied to the performance bond given by the eligible builder under a Capehart Act contract. The court held (p. 368):

" . . . The projects are of a private nature until completition and assumption of control by the government. *The mortgagor-builder has a contract with a construction company to build the project. The constructor looks to the mortgagor-builder for payment for his work and owes to the mortgagor-builder the obligation to perform. . . .* " (Italics ours.)

In *In re S. S. Silberblatt, Inc., v. Tax Comm. of the State of New York,* 5 N.Y.(2d) 635, 159 N.E.(2d) 195, 186 N.Y.S.(2d) 646 (1959), it was said:

"Likewise, we must reject appellant's contention that the subject mortgages, as direct obligations to the United States, are immune from State or local taxation, as provided in section 3701 of the Revised Statutes of the United States (U. S. Code, tit. 31, § 742) which exempts 'Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States' since they are not 'of the same type as those specifically enumerated' in the statute (*Smith v. Davis*, 323 U.S. 111, 117). Under the arrangement authorized by the Enabling Act, it is clear that the device employed was designed to relieve the Government of its financially burdensome obligation to provide housing for its military personnel and at the same time avoid increasing the national debt. It did not pledge its credit in the usual sense, but merely guaranteed each 'periodic payment' based on a monthly average of $90 per family unit."

Congress, in its discretion, by enacting the Capehart law, chose to leave the hazards of construction, the purchasing of proper materials, and the furnishing of proper labor performance to private contractors and private lenders. It chose to guarantee only the payment to the private lender, after units acceptable to the government were erected upon the leased premises. We conclude, therefore, that the mortgagor-builder corporation was the party legally obligated to pay the contractor, and that it was the buyer denominated in RCW 82.08.050.

Is the mortgagor-builder corporation an agency of the United States?

Appellants contend that title to the units, when built in accordance with the contracts, vested in the United States; that the United States controlled and dictated the terms of the construction contracts, and that it guaranteed the mortgage obligation and ultimately gained ownership of all of the corporation's capital stock; hence, the corporation is a government agency.

In support of this contention, appellants rely on *Clallam County v. United States*, 263 U.S. 341, 68 L.Ed. 328, 44 S.Ct. 121 (1923); *Green v. Eglin AFB Housing, Inc.*, 104 So.(2d) 463 (Fla. 1958); and *Knapp-Stiles, Inc., v. Michigan Department of Revenue*, CCH 2 Mich. Tax Cases ¶ 200-202 (1962).

The *Clallam County* case held that a corporation, organized pursuant to a World War I emergency act which authorized the Director of Aircraft Production to establish one or more state corporations to produce war materials, was an agency of the United States and, as such, its activities were exempt from state taxation. The case is not apropos. The Director of Aircraft Production was, by law, an agent of the government. In the instant case, the successful bidders were not authorized agents of the government. Furthermore, the facts in the cited case did not disclose any evidence of an intent to distinguish the corporate activities from those of the United States. In this regard, the court stated (p. 345): " . . . This is not like the case of a corporation having its own purposes as well as those of the United States . . . "

In the *Green* case, the court stated (p. 467):

" . . . The question here is the extent of an *exemp-*

tion granted by *state statute*. Had the legislature intended to limit the exemption to that required by the Federal Constitution there would have been no occasion whatever to go further than to say "There shall also be exempted all sales made to the United States." But the legislature intended to grant a greater exemption and made that intent clear . . . ' "

In *Knapp-Stiles, Inc., v. Michigan Department of Revenue, supra,* the court stated:

"At the outset, it may be noted that the question is *not* whether the State has the *power* to impose such tax upon contractors who are performing contracts with the United States.

" . . .

"Michigan has the power to impose such a tax. Has it done so? Or has it, by the language of the statute, exempted the sales here involved from the tax? . . . "

In the *Green* and *Knapp-Stiles* cases, the result was determined by interpreting a state exemption statute much broader than our own, for which reason the cases are distinguishable.

[5] The mortgagor-builder corporate entity created for the purpose of constructing and financing Capehart housing serves a separate and distinct function from that of the United States. That such a corporation is not an agency of the United States is sustained by the following decisions:

In *In re S. S. Silberblatt, Inc., v. Tax Commission of the State of New York, supra,* the New York Court of Appeals held that the mortgagor-builder corporation

was subject to that state's mortgage recording tax, stating (p. 641):

"The appellant's contention that this petitioner and the five corporate mortgagors are instrumentalities of the Federal Government or its agencies and, as such, are exempt from State and local taxation, is without substance.... At the time of the execution, delivery and recording of these mortgages, each of the mortgagors was a private corporation, all of the capital stock of which was privately owned. They were created for a commercial purpose for private profit, as distinguished from a governmental purpose. In the absence of statute to the contrary, it may not be assumed that a governmental function was involved. They possess all of the requisites and responsibilities of corporate existence and, as such, *are an entity separate and apart from the United States* (*United States v. Strang*, 254 U.S. 491) *and this is so, notwithstanding the fact that all of the capital stock of each corporation will ultimately be owned by the Federal Government* (*Sloan Shipyards v. United States Fleet Corp.*, 258 U.S. 549, 42 S.Ct. 386, 66 L.Ed. 762) ..." (Italics ours)

In *United States v. Ft. George G. Meade Defense Housing Corp. No. 1*, D.C., 186 F.Supp. 639 (1960), it was held that the leasehold interest acquired by the mortgagor-builder corporation from the United States was subject to the Maryland mechanics' lien law because

"... the so-called Capehart Act contemplates leaving the entire arrangement for the financing and construction of Capehart housing projects in the hands of

private enterprise until the point at which the government has secured the capital stock of the Housing Corporation . . . "

The reasoning in the following cases, although not arising from Capehart transactions, supports the view that the mortgagor-builder corporations are not agencies of the government.

In *E. I. Du Pont de Nemours & Co. v. State*, 44 Wn. (2d) 339, 267 P.(2d) 667 (1954), it was contended that the Du Pont Company was an agent or instrumentality of the United States in its operation of the Hanford Engineer Works. We held (pp. 349, 350):

" . . . the fact that the government reserved and exercised the right to restrict or control the action of the contractor as to its general activities does not establish the existence of an agency relationship. . . .

" . . .

"It is also without significance that all of the real and personal property utilized in performing the contract was owned by the government. [Citing cases.] The same is true with regard to the fact that the government exerted unusual supervisory controls over every phase of the contractor's activity. [Citing case.]"

In *United States v. Brown*, D.C., 41 F.Supp. 838 (1941), the contention was rejected that certain Regional Agricultural Credit Corporations, created pursuant to federal enactment, were immune from state taxation because the United States owned all of the capital stock of the corporations. The court said (p. 840):

"Whether or not these Regional Corporations shall enjoy sovereign immunity from taxation is wholly a

question of Congressional intent. They are purely commercial corporations exercising no sovereign function. In the absence of statutory provision, there is no reason why they should be exempted from taxation, especially in view of Congressional policy concerning this type of corporation, evidenced by many statutory provisions expressly subjecting the real property of similar corporations to taxation.

"The mere fact that the United States owns all the capital stock of these corporations is not alone sufficient to endow them with sovereign immunity, nor do they acquire such immunity merely because they are the medium through which the Government carries out certain proprietary activities. Note, 83 L.Ed. 799 et seq.

" . . .

"When a corporation is created for commercial as distinguished from Governmental purposes, it is ordinarily implied in the absence of statutory provisions to the contrary, that such corporation shall have all the requisites and responsibilities of corporate existence, even though the United States owns all the stock. Such a corporation is an entity separate from the United States. *United States v. Strang*, 254 U.S. 491, 41 S.Ct. 165, 65 L.Ed. 368."

We conclude that the mortgagor-builder corporation, having served an independent and distinct purpose in the taxable event, is not a federal agency.

Further, Congress has not expressed a legislative intent to immunize a Capehart corporation from state taxation. The invitations to bid expressly provided:

"Nothing in this Invitation for Bids shall be deemed

to relieve the eligible builder of any liability for the payment of sales or use taxes properly levied."

For the reasons stated, the sales tax was "properly levied" upon these transactions. Appellants, under the statute, were obligated to collect the tax from the mortgagor-builder corporations. Having failed to collect it, appellants are liable for the tax. RCW 82.08.050, *supra*.

The judgments are affirmed.

FINLEY, ROSELLINI, HAMILTON, and HALE, JJ., concur.

HUNTER, J. (dissenting)—The majority say that the sales tax must fall upon the person legally obligated to pay for construction of the military housing. With this I agree.

The majority then state that, by the express terms of the contract with the mortgagor-builder, the Delaware corporation, and not the United States was legally obligated to pay the appellant contractors; hence, the corporation was the buyer under the statute. The fact that the ultimate economic burden of the tax may fall upon the United States does not constitute it as the person legally obligated to pay the tax. Neither do I disagree with this rationale.

It is my disagreement with the majority in the disposition of the issue relating to whether the mortgagor-builder corporation is an instrumentality of the United States that bring me to a result contrary to that of the majority in this case.

Under the established rule for the construction of contracts, a contract must be picked up by its four

corners and considered in its entirety. In so doing, it is inescapable to conclude other than that the prime purpose of the housing contract was the construction of military housing for the exclusive use of the United States. It was necessarily the obligation of the government to pay for this housing and, although it did not wish to be directly obligated, the United States, in causing the Delaware corporation to be organized, did so to provide a means to carry out its obligation to compensate the contractors for the construction of this housing.

In *Clallam County v. United States*, 263 U.S. 341, 68 L.Ed. 328, 44 S.Ct. 121 (1923), it was held that a corporation created for the purpose of operating a sawmill and railroad for the promotion of the war effort and wholly owned by the United States was an instrumentality of the United States. The court there said:

"In short the Spruce Production Corporation was organized by the United States an an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States and *was used by it solely as means to that end*, and when the war was over it stopped its work except so far as it found it necessary to go on in order to wind up its affairs. . . .

" . . .

"The State claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds, but that taxation of the property of the agent is not taxation of the means. We agree that it

'is not always, or generally, taxation of the means,' as said by Chief Justice Chase in *Thomson v. Pacific Railroad*, 9 Wall 579, 591. But it may be, and in our opinion clearly is when as here not only the agent was created but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. *This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. . . .* " (Italics mine.)

Contemporaneous with the signing of the housing contract, the stock of the corporation in the instant case was irrevocably placed in escrow, together with the resignation of the officers and directors, to be delivered to the United States at the conclusion of the construction of the housing. There was no possible contingency for the return of the stock to the stockholders or the documents of resignation to the officers and directors. The corporation owned nothing of any value in the housing being constructed. It served solely as a means to the end of obtaining military housing for the United States. There was no possibility for it to engage in any purpose other than to serve the end of obtaining military housing for the United States on this exclusive project. Because it had no purposes independent of those of the United States, the corporation was nothing more than an instrumentality thereof.

The appellants cite *Green v. Eglin AFB Housing, Inc.*, 104 So.(2d) 463 (Fla. 1958), which is persuasive

of their contention. There, under the authority of the Capehart Act, the government entered into a contract virtually identical with that of the instant case for the construction of military housing at the Eglin Air Force Base in Florida. The Florida court in effect found that the Delaware corporations were government instrumentalities, stating:

"'The AFB corporations were created at the direction of the United States for the sole purpose of borrowing money to be expended in constructing facilities needed by the United States, to be repaid by the United States and further securing the payment of this money by a mortgage upon property of the United States. These corporations will continue in existence until the mortgage debts are paid, so as to provide a party against whom the mortgages may be foreclosed in the remote contingency that the United States defaults in its obligation to pay the mortgage debt.

"'Even if we regard the AFB corporation as private enterprises, their interest in the property is so neglible —lessees without right of use or possession—as to make it entirely unrealistic to hold that it destroys the status of these buildings as a part of the public works of the United States.

"'It is very doubtful if these corporations should be regarded as anything other than agencies or instrumentalities of the Federal Government. In *Clallam County, Wash. v. United States*, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328, the Supreme Court held that a corporation created for the purpose of operating a sawmill and railroad in the promotion of the war ef-

fort during the first World War and which was wholly owned by the United States was an agency of the United States and that its property was, therefore, immune from state taxation. In describing the corporation there involved the [sic] used language peculiarly applicable to each AFB corporation: "The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends." The creation of the AFB corporations was only for the convenience of the United States to enable it to finance military construction in a manner determined by the Congress to be most conducive to the national interest. . . . ' "

The limited function of the Delaware corporation, its power and purpose are aptly stated by the Michigan court in *Knapp-Stiles, Inc., v. Michigan Department of Revenue*, CCH 2 Mich. Tax Cases ¶ 200-202 (1962). There, as here, the contracts were for military housing under the Capehart Act. The court said relative to the corporations:

" . . . In the Invitation for Bids, which is prepared and issued by the United States, acting through the Department of the Air Force, there is found in Paragraph 1, above quoted, the following:

" 'The statute further contemplates that the Government-owned housing site be leased to a mortgagor or borrower corporation *which will act as a channel* for the proceeds of the mortgage loan from the lender to the successful bidder . . . '

"And a review of the documents—the lease, the contract, and the mortgage is convincing that this is sub-

tantially the only function that the Delaware corporation do perform.

"They have no real powers except to do the bidding of the United States. . . .

" . . .

"The corporations do not determine the terms of the contract. That is all done before the corporations come into existence. They do not determine whether the contract has been performed. They cannot modify its terms. They cannot terminate it.

"True, the corporations had a lease upon the premises. While this is nominally for a fifty-five year term, in fact, the actual possession, maintenance and operation of the housing is in the hands of the United States and its Air Force as soon as the housing is ready for occupancy.

"The United States alone determines the terms of the contract. It alone can modify or terminate it. It alone determines when it has been performed."

An analysis of *In re S. S. Silberblatt, Inc., v. Tax Comm. of the State of New York*, 5 N.Y.(2d) 635, 159 N.E.(2d) 195, 186 N.Y.S.(2d) 646 (1959), cited by the majority, discloses that the opinion is based on the erroneous premise that the Delaware corporations were " . . . created for a commercial purpose for private profit, as distinguished from a governmental purpose." As heretofore stated, consideration of the housing contract in its entirety cannot support such a conclusion. The analysis of the housing contract and the reasoning of the dissent in the *Silberblatt* case is correct.

"... Although under our State law the tax is imposed upon the recording of the mortgage (*Franklin Soc. v. Bennett*, 282 N.Y. 79), this case is controlled by Federal law under which the tax is on the mortgage itself, which is a Federal instrumentality exempt from State taxation (*Federal Land Bank v. Crosland*, 261 U.S. 374; ...). Unlike the Wherry Act, the Capehart Act, under which this military housing project was authorized, renders petitioner-appellant merely a builder and not a private sponsor of the military housing. The United States, through its Department of Defense, is the sponsor, financier and owner of the entire project. The mortgagor corporations are mere fictions, and they and the mortgagee banks had no other function in this business than to act as agents for the Federal Government (*Clallam County v. United States*, 263 U.S. 341, 345, 44 S.Ct. 121, 68 L.Ed. 328; *Railroad Co. v. Peniston*, 18 Wall 5, 42, 85 U.S. 5, 42, 21 L.Ed. 787) ..."

The majority attempt to distinguish the *Clallam County* case on the basis that the corporation there had no purpose other than to produce war materials for the United States government, and it quotes from the *Clallam County* case as follows:

"'... This is not like the case of a corporation having its own purposes as well as those of the United States....'"

The inference from this quotation which is desired by the majority is that the Delaware corporation had purposes other than those of the United States government. This is erroneous and unsupported by the record.

The holding of the cases cited by the majority, *E. I. Du Pont de Nemours & Co. v. State*, 44 Wn.(2d) 339, 267 P.(2d) 667 (1954), and *United States v. Brown*, 41 F.Supp. 838 (1941), is not inconsistent with the *Clallam County* case since the corporations, in those cases, were not instrumentalities of the United States because they had separate commercial purposes for private profit.

In the instant case we should hold that, although the mortgagor-builder is the "buyer" to whom the retail sale of the housing project construction was made, it was nothing more than an instrumentality of the United States government; that it had no commercial purpose other than for the convenience of the United States, serving as a means to the end of obtaining this military housing; and that the sovereign immunity of the federal government applies.

The judgment of the trial court should be reversed, and the cause remanded with instructions to enter judgment restraining the Tax Commission from imposing the tax and to permit recovery of the tax which appellants paid under protest.

HILL, DONWORTH, and WEAVER, JJ., concur with HUNTER, J.

APPENDIX B

STATUTES INVOLVED

Revised Code of Washington

RCW 82.08.010 Definitions. For the purposes of this chapter:

(1) "Selling price" means the consideration, whether money, credits, rights, or other property, expressed in the terms of money paid or delivered by a buyer to a seller, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; but shall not include the amount of cash discount actually taken by a buyer;

(2) "Seller" means every person making sales at retail or retail sales to a buyer or consumer, whether as agent, broker, or principal;

(3) "Buyer" and "consumer" include, without limiting the scope hereof, every individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, municipal corporation, quasi municipal corporation, and also the state, its departments and institutions and all political subdivisions thereof, irrespective of the nature of the activities engaged in or

functions performed, and also the United States or any instrumentality thereof;

(4) The meaning attributed in chapter 82.04 to the terms "tax year," "taxable year," "person," "company," "sale," "sale at retail," "retail sale," "sale at wholesale," "wholesale sale," "business," "engaging in business," "cash discount," "successor," "consumer," "in this state" and "within this state" shall apply equally to the provisions of this chapter. . . .

RCW 82.08.020 Retail sales tax imposed. There is levied and there shall be collected a tax on each retail sale in this state equal to three and one-third per cent of the selling price: *Provided*, That from April 1, 1959 the tax imposed by this section shall be equal to four per cent of the selling price. The tax imposed under this chapter shall apply to successive retail sales of the same property and to the retail sale of intoxicating liquor by the Washington state liquor stores. . . .

RCW 82.08.030 Exemptions. The tax hereby levied shall not apply to the following sales:

(1) Casual and isolated sales of property or service, unless made by a person who is engaged in a business activity taxable under chapters 82.04., 82.16 or 82.28: *Provided*, That the exemption provided by this paragraph shall not be construed as providing any exemptio nfrom the tax imposed by chapter 82.12;

(2) Sales made by persons in the course of business activities with respect to which tax liability is specifically imposed under chapter 82.16, when the gross proceeds from such sales must be included in the measure of the tax imposed under said chapter;

(3) The distribution and newsstand sales of newspapers;

(4) Sales which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

(5) Sales of motor vehicle fuel used in aircraft by the manufacturer thereof for research, development, and testing purposes and sales of motor vehicle fuel taxable under chapter 82.36: *Provided*, That the use of any such fuel upon which a refund of the motor vehicle fuel tax has been obtained shall be subject to the tax imposed by chapter 82.12;

(6) Sales (including transfers of title through decree of appropriation) heretofer or hereafter made of the entire operating property of a publicly or privately owned public utility, or of a complete operating integral section thereof, to the state or a political subdivision thereof for use in conducting any business defined in subdivisions (1), (2), (3), (4), (5), (6), (7), (8), (9), (10) or (11) of RCW 82.16.010;

(7) Auction sales made by or through auctioneers of tangible personal property (including household goods) which have been used in conducting a farm activity, when the seller thereof is a farmer and the sale is held or conducted upon a farm and not otherwise;

(8) Sales to corporations which have been incorporated under any act of the congress of the United States and whose principal purposes are to furnish volunteer aid to members of armed forces of the United States and also to carry on a system of national and international relief and to apply the same in mitigat-

ing the sufferings caused by pestilence, famine, fire, floods, and other national calamities and to devise and carry on measures for preventing the same;

(9) Sales of purebred livestock for breeding purposes where the animals are registered in a nationally recognized breed association; sales of cattle and milk cows used on the farm;

(10) Sales of tangible personal property (other than the type referred to in subdivision (11) hereof) for use by the purchaser in connection with the business of operating as a private or common carrier by air, rail, or water in interstate or foreign commerce: *Provided*, That any actual use of such property in this state shall, at the time of such actual use, be subject to the tax imposed by chapter 82.12;

(11) Sales of airplanes, locomotives, railroad cars, or watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire or for use in conducting commercial deep sea fishing operations outside the territorial waters of the state; also sales of tangible personal property which becomes a component part of such airplanes, locomotives, railroad cars, or watercraft, and of motor vehicles or trailers used by the holder of a carrier permit issued by the Interstate Commerce Commission authorizing transportation by motor vehicle across the boundaries of this state, in the course of constructing, repairing, cleaning, altering, or improving the same; also sales of or charges made for labor and services rendered in respect to such constructing, repairing, cleaning, altering, or improving;

(12) Sales of motor vehicles and trailers to be used for the purpose of transporting therein persons or property for hire in interstate or foreign commerce: *Provided*, That the purchaser must be the holder of a carrier permit issued by the Interstate Commerce Commission and that the vehicles will first move upon the highways of this state from the point of delivery in this state to a point outside of this state under the authority of a one-transit permit issued by the director of licenses pursuant to the provisions of RCW 46.16.100;

(13) Sales of motor vehicles and trailers to nonresidents of this state for use outside of this state, even though delivery be made within this state, but only when (a) the vehicles or trailers will be taken from the point of delivery in this state directly to a point outside this state under the authority of a one-transit permit issued by the director of licenses pursuant to the provisions of RCW 46.16.100, or (b) said motor vehicles and trailers will be registered and licensed immediately under the laws of the state of the purchaser's residence, will not be used in this state more than three months, and will not be required to be registered and licensed under the laws of this state.

(14) Sales to nonresidents of this state for use outside of this state of tangible personal property which becomes a component part of any machinery or other article of personal property belonging to such nonresident, in the course of installing, repairing, cleaning, altering, or improving the same and also sales of or charges made for labor and services rendered in respect to any installing, repairing, cleaning, altering, or

improving, of personal property of or for a nonresident, but this subsection (14) shall apply only when the seller agrees to, and does, deliver the property to the purchaser at a point outside this state, or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state;

(15) Sales to nonresidents of this state for use outside of this state of watercraft requiring coast guard registration or registration by the state of principal use according to the Federal Boating Act of 1958, even though delivery be made within this state, but only when (a) the watercraft will not be used within this state for more than forty-five days and (b) an appropriate exemption certificate supported by identification ascertaining residence as provided by the tax commission and signed by the purchaser or his agent establishing the fact that the purchaser is a non-resident and that the watercraft is for use outside of this state, one copy to be filed with the tax commission with the regular report and a duplicate to be retained by the dealer.

(16) Sales of baby chicks and turkey poults for use in the production for sale of poultry or poultry products.

(17) Sales to nonresidents of this state for use outside of this state of machinery and implements for use in conducting a farming activity, when such machinery and implements will be transported immediately outside the state. As proof of exemption, an affidavit or certification in such form as the tax commission shall require shall be made for each such sale, to be retained as a business record of the seller.

(18) Sales for use in noncontiguous states, territories and possessions of the United States, but only when, as a necessary incident to the contract of sale, the seller delivers the subject matter of the sale to the purchaser or his designated agent at the usual receiving terminal of the carrier selected to transport the goods, under such circumstances that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions. . . .

* * *

RCW 82.08.050 Buyer to pay, seller to collect tax—Penalties. The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the tax commission pursuant to the provisions of RCW 82.08.060. The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the commission, and any seller who appropriates or converts the tax collected to his own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter shall be guilty of a misdemeanor.

In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the commission in the manner prescribed by this chapter, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he

shall, nevertheless, be personally liable to the state for the amount of the tax.

The amount of tax, until paid by the buyer to the seller, or to the commission, shall constitute a debt from the buyer to the seller and any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter shall be guilty of a misdemeanor.

Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the commission, the commission may, in its discretion, proceed directly against the buyer for collection of the tax, in which case a penalty of ten percent may be added to the amount of the tax for failure of the buyer to pay the same to the seller, regardless of when the tax may be collected by the commission; and all of the provisions of chapter 82.32, including those relative to interest and penalties, shall apply in addition; and, for the sole purpose of applying the various provisions of chapter 82.32, the fifteenth day of the month following the bimonthly tax period in which the purchase was made shall be considered as the due date of the tax. . . .

RCW 82.08.060 Collection of tax — Methods and schedules. The tax commission shall have power to adopt rules and regulations prescribing methods and schedules for the collection of the tax required to be collected by the seller from the buyer under this chapter. The methods and schedules prescribed shall be

adopted so as to eliminate the collection of fractions of one cent and so as to provide that the aggregate collections of all taxes by the seller shall, insofar as practicable, equal the amount of tax imposed by this chapter. Such schedules may provide that no tax need by collected from the buyer upon sales below a stated sum and may be amended from time to time to accomplish the purposes set forth herein. . . .

* * *

RCW 82.08.140 Administration. The provisions of RCW 82.04.470 and all of the provisions of chapter 82.32 shall have full force and application with respect to taxes imposed under the provisions of this chapter. . . .

"SALE DEFINED

RCW 82.04.040 "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consid ation and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. It includes renting or leasing, conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

"Casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved.

"SALE AT RETAIL," "RETAIL SALE" DEFINED

RCW 82.04.050 "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) other than a sale to one who (a) purchases for the purpose of resale as tangible personal property in the regular course of business, or (8) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsection (2), and 82.04.290.

The term "sale at retail" or "retail sale" shall include the sale or charge made for tangible personal property consumed and or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds and insects; (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above

real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth, excepting the mere leveling of land used in commercial farming or agriculture; (c) the sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; (d) the sale of or charge made for labor and services rendered in respect to automobile towing, armored car service and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16; (e) the sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same.

The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any publicly owned street, place, road, highway, bridge, or trestle which is used for to be used primarily for foot or vehicular traffic, nor shall it include sales of feed, seed, fertilizer,

and spray materials to persons for the purposes of producing for sale any agricultural product whatsoever, including milk, eggs, wool, fur, meat, honey, or other substances obtained from animals, birds, or insects.

"SALE AT WHOLESALE," "WHOLESALE SALE" DEFINED

RCW 82.04.060 "Sale at wholesale" or "wholesale" sale" means any sale of tangible personal property which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: *Provided*, That the the term "real or personal property" as used in this section shall not include any natural products named in RCW 82.04.100.

"GROSS PROCEEDS OF SALES" DEFINED

RCW 82.04.070 "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

"CONSUMER" DEFINED

RCW 82.04.190 "Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property other than for the purpose (a) of resale as tangible

personal property in the regular course of business or (b) of incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers or (c) of consuming such property in producing for sale a new article of tangible personal property or a new substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale;

(2) Any person engaged in any business activity taxable under RCW 82.04.290;

(3) Any person engaged in the business of contracting for the building, repairing or improving of any publicly owned street, place, road, highway, bridge or trestle which is used or to be used primarily for foot or vehicular traffic as defined in RCW 82.04.280, in respect, however, only to tangible personal property used or consumed in such business;

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real or personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business, excluding only the United States, the state, and its political subdivisions in respect to labor and services rendered to their real property which is used or held for public road purposes.